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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF COLUMBUS-AMERICA DISCOVERY GROUP, THE NATIONAL MARITIME HISTORICAL SOCIETY, AND THE NATIONAL ASSOCIATION OF ACADEMIES OF SCIENCE AS AMICI CURIAE IN SUPPORT OF AFFIRMANCE

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

ALAN G. CHOATE
One North Charles Street
The Blaustein Building
Baltimore, MD 21201
(410) 347-7007

RICHARD T. ROBOL
Counsel of Record
JANE E. RINDSBERG
JASON S. WRACHFORD
COLUMBUS-AMERICA DISCOVERY GROUP
433 West Sixth Avenue
Columbus, Ohio 43201
(614) 299-6000

Counsel for Amici Curiae

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INTERESTS OF AMICI CURIAE[1]

As the Court of Appeals noted, Columbus-America Discovery Group ("Columbus-America") -- the sole *amicus*

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[1] Both the petitioners and the respondent have consented to the filing of this brief. The letters of consent are on file with the Clerk's office. Pursuant to Supreme Court Rule 37.6, counsel for the *amici curiae* hereby certify that this brief was not authored in whole or in part by counsel for any party, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

curiae below -- is "a multidisciplinary team of scientists, engineers, historians and entrepreneurs devoted to exploring the deep ocean." Pet. App. A3. More than a century after the luxury sidewheel steamer known as the SS *Central America* went down in a storm off the South Carolina coast on September 12, 1857, Columbus-America located the shipwreck in more than 8,000 feet of water. Since this discovery, Columbus-America has used its underwater robot -- *Nemo* -- to recover gold, passenger trunks, other artifacts, and a wealth of historical and scientific information from the shipwreck site. Columbus-America has also devoted substantial resources to promoting the historical, scientific, and educational values of the SS *Central America*.

Columbus-America's accomplishments have not gone unnoticed. They have received a great deal of attention from the admiralty bar and beyond, and the Fourth Circuit Court of Appeals bestowed the following accolade upon the group two years ago: "In short, we cannot imagine anyone demonstrating more diligence, skill, and energy than Columbus-America has shown here. Its efforts provide a standard against which all others should be judged." *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al.*, 56 F.3d 556, 572 (4th Cir.), *cert. denied*, 116 S. Ct. 352 (1995).

The National Maritime Historical Society (the "Society") is a nonprofit educational organization that is dedicated to promoting greater awareness and appreciation of America's maritime heritage. Most fundamentally, the Society believes that understanding our past, including our maritime history, is vital to meeting the problems of the present and preparing for the challenges of the future.

The Society seeks to foster and promote maritime knowledge through a broad spectrum of educational programs in sea history, including programs sponsored at museums,

schools, and universities regarding shipwreck preservation, ship building, seamanship, marine art, and literature of the sea. The Society maintains a national library and biographical archives and publishes a number of educational materials, including its quarterly magazine, *Sea History*. The Society also serves as a clearinghouse for information on historic shipwrecks and raises funds to help save and restore certain ships. Currently, the Society is engaged in a partnership with Operation Sail 2000 to bring sailing ships to America's Atlantic Coast in the year 2000.

The National Association of Academies of Science (the "Association") is comprised of forty-seven member academies and is devoted to promoting scientific inquiry, advancing education, and fostering practical and theoretical progress in science. The Association works closely with its junior and collegiate academies of science to support scientific research at the high school and university levels, and it sponsors numerous seminars and other scientific endeavors across the country.

The Association has a vital interest in encouraging responsible explorers to utilize state-of-the-art scientific techniques to recover and preserve items lost at sea. Recognizing that there are virtually untapped resources in the earth's seas that might lead to new discoveries of important scientific value, the Association believes that the exploration of shipwreck sites provides a tremendous opportunity for furthering the development of scientific knowledge.

Among the parties and various groups appearing as *amici curiae* in this matter, Columbus-America, the Society, and the Association bring a unique perspective to bear. Columbus-America is at the forefront in exploring in ocean depths that were believed by most to be unreachable until very recently, often in waters that lie far beyond the territorial boundaries of any nation. Much of its work is accomplished

by utilizing advanced technologies, including side-scan sonar, underwater robots, and teleoperated vehicles known as telebots. In its work, Columbus-America has had to deal extensively with domestic and international admiralty law, and has gained firsthand experience with (i) legal principles and presumptions governing maritime issues such as abandonment and (ii) how the practical implications of those principles and presumptions may affect future explorations of the deep-sea floor. Similarly, the Society and the Association promote the preservation and study of shipwrecks in national and international waters. Whereas the focus of the parties and other *amici curiae* necessarily tends to be on the interstices of state and federal law under the Abandoned Shipwreck Act of 1987 (the "ASA"), the perspective of Columbus-America, the Society, and the Association is drawn from the broader realm of admiralty and maritime law, both within and without the boundaries of the United States.

Columbus-America, the Society, and the Association submit this brief in support of affirmance of the decision below in order to assist the Court in addressing fundamental legal issues that are of paramount importance to scientists, entrepreneurs, and explorers around the world. These issues, which are of first impression for the Court, concern the legal meaning and application of the term "abandonment" in admiralty law. Of particular importance in this case is whether the Court should adopt the Ninth Circuit's application of the traditional rule of inferred abandonment, along with the rebuttable presumption of unity of the *in rem* defendant, or instead should adopt the Fourth Circuit's unprecedented extension of the "express abandonment" theory from sunken warships to long-lost merchant vessels, along with similarly unprecedented legal presumptions in favor of intervening claimants against the *in rem* plaintiff. Because Columbus-America is the *in rem* plaintiff in ongoing Fourth Circuit litigation, it is particularly well-positioned to address these issues in an informed and useful fashion.

STATEMENT OF THE CASE

Unlike the briefs of the parties and the other *amici curiae*, this brief will be addressing only the abandonment issue raised by the decision below. To bring this issue into sharper focus here, this brief will briefly recapitulate the components of the Court of Appeals' holding on abandonment, which encompasses several distinct, though related, legal points.

This case began when Deep Sea Research, Inc. filed an *in rem* complaint in admiralty against the *Brother Jonathan*, a merchant vessel that sank off the coast of northern California in 1865. Deep Sea Research's complaint sought possessory rights and confirmation of title or, alternatively, a salvage award. The State of California moved to dismiss on grounds of a lack of federal jurisdiction and the State's immunity under the Eleventh Amendment. Pet. App. A22-A23. The District Court ultimately concluded that the *Brother Jonathan* was not abandoned and accordingly denied the State's motion to dismiss, while granting Deep Sea Research's request to be appointed as the exclusive salvor of the shipwreck.[2] *Id.* at A57-A58.

On appeal, the Ninth Circuit affirmed on the abandonment issue. The court upheld the traditional maritime rule that the abandonment of merchant shipwrecks can be inferred from all of the relevant facts and circumstances. Pet. App. A15-A17. The Ninth Circuit thus rejected the Fourth

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[2] Neither the District Court nor the Ninth Circuit, however, has yet adjudicated the merits of Deep Sea Research's claims for relief. In fact, the District Court expressly agreed with the suggestion that "any determination regarding title should be made after the salvage operation is completed." Pet. App. A36. The Ninth Circuit's holdings accordingly are limited to the procedure for determining jurisdiction.

Circuit's solitary view that the abandonment of merchant shipwrecks can be proved only by presenting "clear and convincing evidence" of an "express abandonment." *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co., et al.*, 974 F.2d 450, 461, 464 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993). The Ninth Circuit accurately characterized the Fourth Circuit's ruling as having "introduced a significant modification into maritime law." Pet. App. A15-A16 (citing *Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting)).

In addition, the Ninth Circuit refused to presume that the *in rem* defendant should be divided into "abandoned" and "unabandoned" portions. The court concluded that when portions of a sunken merchant vessel were insured and other portions were uninsured, it would be improper to "divide the wreck of the [vessel] into abandoned and unabandoned portions" without considering the merits of whether the intervening claimant could prove title superior to the claim of the *in rem* plaintiff. Pet. App. A17-A18. The court recognized that any other approach would be "inconsistent with the general rule in maritime law of treating wrecks as a legally unified *res*," and pointed out that "the Fourth Circuit's decision in *Columbus-America* appears to be the only admiralty case in which a wreck has not been treated as a unified whole." *Id.* at A18. In addition, the court realized that applying the Fourth Circuit's presumption against unity of title would likely result in two separate proceedings, one in state court and the other in federal court, adjudicating virtually identical issues, and concluded that "[i]t is unlikely that Congress intended such a confusing and inefficient approach in adopting the ASA." Pet. App. A18.

SUMMARY OF ARGUMENT

Columbus-America, the Society, and the Association submit this brief as *amici curiae* in support of affirmance on

the abandonment issue.

The Court of Appeals was correct in holding that a sunken merchant vessel can be abandoned in *either* of two ways: (i) by an affirmative renunciation of title; or (ii) by a permissible inference from the lapse of time or failure to pursue salvage efforts on the part of the owners. This is the traditional maritime rule, which remains widely accepted today. In particular, it encourages the beneficial use of property by liberating third parties to undertake efforts to recover it.

The Court of Appeals also properly rejected the petitioners' invitation to divide the shipwreck into abandoned and unabandoned portions. The court's treatment of this issue was thus consistent with the general rule in maritime law, which creates a rebuttable presumption that sunken merchant vessels are to be treated as a legally unified *res*. This approach has long been preferred because it offers the most practical basis for conducting the operations needed to manage an underwater recovery site and facilitates more efficient judicial administration.

ARGUMENT

I. THERE IS NO BASIS IN LOGIC OR PRECEDENT FOR EXTENDING THE THEORY OF "EXPRESS ABANDONMENT" FROM SUNKEN WARSHIPS TO SUNKEN MERCHANT VESSELS.

The *amici curiae* are concerned about the significant legal and practical consequences that would flow from extending the "express abandonment" theory from sunken warships to long-lost merchant vessels. This extension would be contrary to an overwhelming body of precedent in the American courts and to well-settled principles of international

maritime law. The "express abandonment" theory would accord purported ownership interests in sunken merchant vessels an impregnable presumption of ageless vitality, and would thereby extend an open invitation to stale and fraudulent claims upon every maritime recovery of a valuable wreck. Adopting that theory would thus spawn confusion and costly litigation in connection with the public administration of historic shipwrecks, and hamper responsible exploration of the deep-sea floor.

A. Abandonment of a Sunken Merchant Vessel Can Be Inferred from All Relevant Circumstances.

The court below recognized that when a split panel of the Fourth Circuit ruled "that abandonment could only be found on the basis of an express renunciation of ownership, [it] introduced a significant modification into maritime law." Pet. App. A15 (citing *Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting)).

Prior to the Fourth Circuit's lone ruling, "[m]odern courts . . . ha[d] rejected the salvage law theory that title to property can never be lost. They ha[d] instead applied the law of finds under the doctrine of *animus revertendi* (the owner has no intention of returning)." *Chance v. Certain Artifacts Found and Salvaged from The Nashville*, 606 F. Supp. 801, 804 (S.D. Ga. 1984), *aff'd without op.*, 775 F.2d 302 (11th Cir. 1985).

Under traditional maritime law, although a sunken merchant vessel and its contents have been involuntarily lost from their owner's possession, abandonment may be inferred when the owner has no hope or intention of returning. *See, e.g., Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978). *See generally* Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-7 (1987). Whether sunken property should be judged to be abandoned has traditionally been understood to present a question of fact. *E.g., Columbus-America*, 974 F.2d at 471 (Widener, J., dissenting); *Nunley v. M/V Dauntless Colocotronis*, 863 F.2d 1190, 1198 n.11 (5th Cir. 1989). Under both general maritime law and the common law, a formal declaration of abandonment is not necessary; instead, abandonment may be inferred from all of the relevant facts and circumstances and may be determined on the basis of circumstantial evidence. *See, e.g., United States v. Sylvester*, 848 F.2d 520, 525 (5th Cir. 1988); *Hatteras, Inc. v. U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097 n.5 (S.D. Tex. 1981) ("A formal declaration is not necessary; abandonment may be inferred from acts and conduct of an owner clearly inconsistent with an intention to return to the property, and from the nature and situation of the property."), *aff'd without op.*, 698 F.2d 1215 (5th Cir.), *cert. denied*, 464 U.S. 815 (1983).

The inferred abandonment rule is so well-established and fundamental that legal encyclopedias treat it as hornbook law:

> Whether a vessel or its contents have been abandoned by the owners is generally considered *a question of fact to be determined from all the circumstances*. A valid abandonment may be accomplished by *either an express or implied act* of leaving or deserting property without hope of recovering it and without intention of returning to it. The most significant factor indicating abandonment appears to be the passage of a considerable length of time without effort on the part of the owners to secure repossession of their property.

70 Am. Jur. 2d *Shipping* § 974 (1994) (emphasis added); *see also* 1 Am. Jur. 2d *Abandoned, Lost and Unclaimed Property*

§ 40 (1962) ("it is not necessary to prove [an] intention to abandon by express declarations or other direct evidence"); 1 Am. Jur. 2d *Abandoned, Lost and Unclaimed Property* § 42, at 50 (1994) ("A finding of abandonment must be based upon evidence from which an inference can reasonably be drawn.").

Under the admiralty customs that have been known since time immemorial to those who choose to use the sea, the failure of the original owner to take any steps to protect its interest in items over a long period of time is a circumstance that has been given considerable weight in assessing whether the items have been abandoned. Moreover, the lapse of time and the non-use of property, though not conclusive, may also lead to an inference of abandonment. *E.g., Chance*, 606 F. Supp. at 804; *see also* Annotation, *Rights in and Ownership of Wrecked or Derelict Vessels and Their Contents Not Cast Upon the Shore*, 63 A.L.R.2d 1369, 1374 (1959) ("The most significant factor indicating abandonment appears to be the passage of a considerable length of time without effort on the part of the owners to secure repossession of their property."). Under the more restrictive "express abandonment" theory, by contrast, such facts are irrelevant, because an express declaration of abandonment is required.

The major federal statute on point -- the ASA, 43 U.S.C. §§ 2101-2106 (1988) -- is also instructive. Because the text of the Act contains no definition of the term "abandoned," it must be assumed to have used the term as it has been judicially defined in admiralty law.[3] *See Evans v.*

[3] Federal courts sitting in admiralty that have considered this issue are in agreement. *See* Pet. App. A15; *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 913 F. Supp. 552, 557 (W.D. Mich. 1995), *aff'd*, 105 F.3d 1078 (6th Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3826 (U.S. June 4, 1997) (No. 96-1936); *Zych v. Unidentified, Wrecked & Abandoned Vessel Believed to be the "SB Seabird"*, 811

United States, 504 U.S. 255, 259 (1992). The legislative history of the statute confirms that the traditional usage of the term, complete with the doctrine of inferred abandonment, was intended by Congress:

> The Committee notes that the term "abandoned" does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in* 1988 U.S.C.C.A.N. 365. By contrast, if the meaning of this term were limited to "express abandonment," the result would be to remove protection for any number of shipwrecks from coverage under the Act and under similar state statutes, greatly skewing their intended application.

The circuit court of appeals that most recently considered the application of the "express abandonment" theory is the Sixth Circuit. *See Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078 (6th Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3826 (U.S. June 4, 1997) (No. 96-1936). In that case, the Sixth Circuit noted that there are "conflicting views" on the proper legal standard for determining an abandonment. *Id.* at 1084. The *in rem* plaintiff had argued that the trial court "erred in determining that the vessel was abandoned because abandonment cannot be shown in the absence of strong and convincing evidence, such as an owner's

F. Supp. 1300, 1309 (N.D. Ill. 1992), *aff'd*, 19 F.3d 1136 (7th Cir.), *cert. denied*, 115 S. Ct. 420 (1994).

express declaration of abandonment, and because the circumstantial evidence relied on was weak." *Id.* at 1083. The State of Michigan, in turn, had urged the Sixth Circuit to reject the Fourth Circuit's more limited approach and to follow the Ninth Circuit in adopting the traditional maritime rule. It therefore opposed the *in rem* plaintiff's argument that abandonment should not be inferred based on the circumstantial evidence. *Id.*

In a unanimous opinion, the Sixth Circuit flatly rejected the theory that abandonment can be proved only by an express renunciation of title *Id.* at 1085.

In its opinion, the Sixth Circuit consciously took sides as between the Ninth Circuit and the Fourth Circuit. It explicitly stated that it was "follow[ing] the lead of *Brother Jonathan* rather than that of *Columbus-America*" to establish a rule of "common sense." *Id.* The court observed that "explicit action" to abandon property "is obviously rare indeed," particularly with items like shipwrecks, where little purpose would appear to be served by making an express abandonment and there is no obvious occasion for the previous owner to do so. *Id.*

Moreover, the Sixth Circuit determined that the Ninth Circuit's reasoning in the *Brother Jonathan* case "accords with the vast majority of decisions that have discussed the [abandonment] issue." *Id.* at 1084-85. In stating the test for abandonment, the Sixth Circuit quoted from the decision below:

> Traditionally, maritime law has found abandonment when title to a vessel has been affirmatively renounced, or when circumstances give rise to an inference that the vessel has been abandoned; courts have found abandonment, for instance, when a vessel is

> "so long lost that time can be presumed to have eroded any realistic claim of original title."
>
> * * *
>
> [The district court's] holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners.

Id. at 1084 (quoting Pet. App. A15-A16; citations omitted).

In another recent case, the First Circuit similarly applied the doctrine of inferred abandonment to determine rights in a merchant vessel that sank in 1909. The court noted that title to the wreck always could be affirmatively renounced, but determined that abandonment could be inferred as well:

> [I]n cases where (1) articles have been *presumptively abandoned, i.e., either* affirmatively renounced, *or* so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand, having been actually recovered, the better-reasoned authorities agree that the law of finds may appropriately be utilized.

Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel, 833 F.2d 1059, 1064-65 (1st Cir. 1987) (emphasis added).

The Fifth and Eleventh Circuits likewise have applied the rule of inferred abandonment to long-lost wrecks. *See Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel,*

758 F.2d 1511, 1514 (11th Cir. 1985); *Treasure Salvors*, 569 F.2d at 337. The same "common sense" rule was applied by Justice Field, sitting as a Circuit Judge, in determining a claim of abandonment more than a century ago. *See United States v. Smiley*, 27 F. Cas. 1132, 1134 (C.C.N.D. Cal. 1864) (No. 16,317) (because "all efforts to recover the property had been given up," the merchant ship and its cargo of over $1,000,000 in gold were considered abandoned after less than two years, despite the absence of any express disclaimer of title by the original owners or their subrogated underwriters).[4]

State supreme courts have also long rejected claims of original owners that were eroded by time, non-use, or other similar circumstances. *See Steinbraker v. Crouse*, 182 A. 448 (Md. 1936) (assignee of company's rights in 169 vessels lost case to salvors of scrap off the vessels); *Howard v. Sharlin*, 61 So. 2d 181 (Fla. 1952) (finder prevailed over putative owner because schooner was "derelict"); *Commonwealth v. Maritime Underwater Surveys, Inc.*, 531 N.E.2d 549, 552 (Mass. 1988) (applying law of finds); *Wyman v. Hurlburt*, 12 Ohio 81, 87 (1843) (finder awarded title over undisputed original owner of cargo on grounds that abandonment had occurred when "all hope, expectation, and intention to recover property were utterly and entirely relinquished").

In contrast to all of these time-honored precedents stands the Fourth Circuit's split-panel opinion in *Columbus-*

[4] Other federal courts have similarly applied the rule of inferred abandonment to long-lost shipwrecks. *See, e.g., Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377, 1385 (S.D. Fla. 1988); *Indian River Recovery Co. v. The China*, 645 F. Supp. 141, 144 (D. Del. 1986); *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). *See also Sub-Sal, Inc. v. The DeBraak*, No. 84-296, 1992 U.S. Dist. LEXIS 2461, at *7-*8 (D. Del. Feb. 4, 1992), *aff'd without op.*, 26 F.3d 123 (3rd Cir. 1994).

America, which sought to extend the disfavored "express abandonment" theory to merchant shipwrecks. This approach would foreclose any factual inquiry into all the circumstances, clinging instead to a wooden and senseless rule that property long lost to its original owner should be kept from all others, even those who would be willing and able to exert the ingenuity and effort to recover it and return it to beneficial use.

The proper rule has been, and should remain, that the issue of abandonment should be decided by the trial court in view of the totality of the circumstances that might reasonably have a bearing upon that factual determination. *See Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1344-47 (E.D. Va. 1990), *rev'd*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

The courts below did not intend to endorse an inflexible *per se* rule on technology, but rather intended that technology be simply one of many factors weighed by the admiralty court in its sound discretion in making the factual finding of abandonment or non-abandonment. The weight of the evidence and the inferences to be drawn regarding the putative owner's intent to abandon in light of the hope or hopelessness of recovery are all inferences committed to the discretion of the admiralty judge.[5] The Ninth Circuit did not

[5] In rejecting the Fourth Circuit's approach to abandonment, the Ninth Circuit effectively adopted Judge Widener's dissenting opinion in *Columbus-America*. The District Court in that case had taken into account the evidence proving the hopelessness of finding and recovering the shipwreck as one of many factors suggesting the insurance claimants did not intend to return to the shipwreck (*animus revertendi*) and had no hope of recovery (*spes recuperandi*). *Columbus-America*, 742 F. Supp. at 1345. The District Court also had taken into account the fact that the insurance claimants had taken

find any abuse of discretion by the District Court. There simply is no basis for imposing a single inflexible legal rule that would sweep aside a careful consideration of-all the circumstances that have been compiled in the course of centuries of decisions by admiralty courts.

Based on the foregoing considerations, the record presented before the District Court in this case appears to support a finding of non-abandonment. Because the District Court did not accept the credibility of the State's sole witness (who testified *ore tenus*) to show abandonment,[6] and because the determination of such credibility issues was within the prerogative of the District Court Judge, there is no basis for reversal here. *See* Pet. App. A31-A32; *see also Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *Columbus-America*, 974 F.2d at 470-71 (Widener, J., dissenting). Instead, the District Court properly concluded that "the most prudent way to proceed with the case at this time" was to appoint the *in rem* plaintiff as the custodian of the site and to postpone "any final determination regarding title" until "after the salvage operation is completed." Pet. App. A36. This preliminary determination warrants affirmance here, and the Ninth Circuit did not err in affirming the District Court's factual findings on these issues.

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no action even to investigate the feasibility of locating and recovering the shipwreck, even after the means of recovery had been available for many years. *Id.* Judge Widener would have affirmed these findings. *See Columbus-America*, 974 F.2d at 475.

[6] The State's witness testified on cross examination that, among other things, he had been retained less than eight days before the hearing, that he accordingly had not researched any insurance records or attempted to contact any of the insurers that allegedly had paid claims, and that he did not know whether the owner or the insurers had made ongoing attempts to locate and recover the *Brother Jonathan*. Pet. App. A32.

B. The "Express Abandonment" Theory Would Be Inconsistent With International Maritime Law.

International maritime law also rejects the "express abandonment" theory as applied to sunken merchant vessels. Before the Fourth Circuit's errant decision, the only proper application of the "express abandonment" theory by modern courts here and abroad involved sunken warships. *See, e.g., United States v. Steinmetz*, 973 F.2d 212, 223 (3rd Cir. 1992) ("although an inference of abandonment can sometimes be made from non-use of private property, property of the United States can only be abandoned as authorized by Congress"), *cert. denied*, 507 U.S. 984 (1993). These vessels are considered distinct because their ownership is entangled with the military powers of sovereign governments. In discussing international maritime law, for example, the ASA Guidelines state:

> Although a sunken warship or other vessel entitled to sovereign immunity often appears to have been abandoned by the flag nation, regardless of its location, it remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party. Any cargo aboard a vessel entitled to sovereign immunity also generally remains the property of the flag nation unless the cargo had earlier been unlawfully captured by that nation. In such a situation, title to the cargo remains in the nation from which it had been captured. Shipwrecks entitled to sovereign immunity are wrecks of warships and other vessels (such as privately owned vessels chartered or otherwise appropriated by a sovereign nation for military purposes) used

> only or government non-commercial service at the time of sinking. Examples of vessels entitled to sovereign immunity would include, but not be limited to, U.S. battleships and German U-boats from World War II, Confederate gunboats and Union ironclads from the Civil War, and British frigates and Colonial privateers from the Revolutionary War.

ASA Guidelines, 55 Fed. Reg. 50,116 (1990).

The rationale for applying the "express abandonment" theory peculiarly to warships stems from special attributes of sovereignty under public international law and the underlying policy considerations implicated by a sunken warship:

> The practice of the U.S. and other countries in recent years has been to depart from the earlier view that abandonment of a warship could be implied by the long passage of time (the premise, for example, in *Deklyn v. Davis, supra*, 1 Hopk. Ch. 154 (N.Y. 1824)). Factors such as an increased reluctance to abandon title to U.S. government property, including vessels that have become, in many situations, the final resting place of military personnel, as well as the existence of more sophisticated methods of salvaging vessels and communicating decisions to abandon vessels, have in effect resulted in a demise of the earlier view. In the absence of an express transfer or abandonment of a U.S. warship sunk in the near past (*e.g.*, in the World War II era), it should be presumed that title to such vessels remains in the U.S. Title to vessels sunk in the more distant past (such as during the 17th and 18th centuries) would, of course, still be

> determined by the more conventional interpretation of abandonment of that period.

M. Leich, 8 *Digest of United States Practice in International Law* 999, 1004 (1980). For similar reasons, it is hornbook international law that whereas a merchant vessel loses its nationality when it sinks, sovereign property does not. *Compare id. with* 45 Am. Jur. 2d *International Law* § 77 (1994) (citing *Smiley*, 27 F. Cas. at 1134 (Field, J.) (U.S. merchant vessel sunk in Mexican waters loses U.S. nationality)).

In short, narrow application of the "express abandonment" theory to sunken warships does not give it any obvious application to sunken merchant vessels in either international or domestic law. Passing title to naval vessels that may be recovered in salvage operations and returned to active service is problematic, as is passing title to their contents, which often may include sensitive military information and technology, and which under public international law, even after sinking, continue to contain the special legal attributes of the nationality and extraterritoriality of sovereign sailing vessels. But property owned by ordinary citizens and rendered worthless for an extended period after it has been lost at sea implicates none of these special concerns, and instead demands strong incentives to spur efforts that may restore it to beneficial use.

Case law from around the world also has rejected the "express abandonment" theory for sunken merchant vessels. The controlling British decision on the proper standard for determining whether a merchant shipwreck is abandoned involved the *RMS Lusitania*, a vessel that was torpedoed and sunk in 1915. *Pierce v. Bemis (The Lusitania)*, 1 Q.B. 384, 385 (1986). In 1982, it was located and salvaged in international waters. Suit was brought to determine who had ownership rights in the vessel's contents. The English

Admiralty Court held that a shipwreck may be presumed abandoned from the facts of the case after a sufficient lapse of time. *Id.* at 389 ("So far as the owners of the contents are concerned, it is a necessary inference from the agreed facts and from the lapse of sixty-seven years before any attempt was made to salve the contents that the owners of the contents abandoned their property.").[7]

Just last year, a Canadian court also rejected the "express abandonment" theory in determining whether the *Atlantic*, a merchant vessel that sank in 1852 in Lake Erie, was abandoned. *See The Queen v. Mar-Dive Corp., et al.* [Dec. 20, 1996], 1996 Ont. C.J. LEXIS 3947. Despite the absence of any express disclaimer of title by the original owners, the court inferred abandonment based on all of the relevant facts and circumstances, including the fact that only one attempt was ever made (in 1873) to salvage the ship before it was ultimately found and recovered in 1984. *Id.* at *109-*110.

Thus, courts from other major maritime nations applying international maritime law follow the traditional rule by treating abandonment as a question of fact, which may be inferred or rejected by the admiralty judge based on all the circumstances of the case. This is the essence of the Ninth Circuit's holding here, which affirmed the District Court's finding of non-abandonment and rejected the Fourth Circuit's solitary and misguided "express abandonment" approach. The traditional rule governing abandonment should be upheld by this Court.

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[7] In *Columbus-America*, Judge Widener cited this decision to show that "[a]bandonment may be inferred from all of the relevant facts and circumstances and may be determined on the basis of circumstantial evidence." *Columbus-America*, 974 F.2d at 472 (Widener, J., dissenting).

II. *IN REM* PROCEEDINGS SHOULD ACCORD HISTORIC SHIPWRECKS A REBUTTABLE PRESUMPTION OF UNITY.

Foreign countries around the globe follow international law by applying a presumption that a sunken vessel which remains underwater for a specific period of time has historical and archaeological value and accordingly should be preserved and protected as a unified whole. *See* Strati, *Deep Seabed Cultural Property and The Common Heritage of Mankind*, 40 Int'l & Comp. L.Q. 859, 863-94 (1991). The Court should find these same general principles to be embedded in American maritime law as well.

A. Shipwrecks Should be Accorded a Rebuttable Presumption of Constituting a Unified *Res*.

The court below properly treated the *Brother Jonathan* as presumptively constituting a unified whole in addressing the threshold issue of jurisdiction. The Ninth Circuit specifically criticized the Fourth Circuit's unique approach of dividing a shipwreck into "abandoned" and "unabandoned" portions, which, it noted, is "inconsistent with the general rule of maritime law of treating wrecks as a legally unified *res*."[8] Pet. App. A18. The Ninth Circuit thus avoided the practical difficulties created by the Fourth Circuit's break with traditional maritime law, which would be to chill incentives for research, to defeat any orderly process for managing deep-sea sites, and to detract from principles of efficient judicial administration.

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[8] The court below, however, carefully noted that the proceedings in the District Court did not involve an adjudication of title on the merits and did not bar proof by intervening claimants to rebut the presumption of unity accorded to the *in rem* defendant. Pet. App. A36-A37.

The *Columbus-America* case, which adopted a rebuttable presumption *against* the unity of the defendant *res*, illustrates some of the problems with that approach. There, the District Court determined that numerous types of gold had been aboard the shipwreck at issue, including passenger gold, a commercial shipment, and several other shipments, yet the insurance companies asserting ownership interests claimed to have insured only the commercial shipment. *Columbus-America*, 742 F. Supp. at 1347.

The District Court found that both the shipwreck and the gold had been abandoned, pointing out that there was no proof that the gold recovered by the *in rem* plaintiff came from the commercial shipment that had allegedly been insured. *Id.* A split panel of the Fourth Circuit reversed, however, holding that an amount of gold equal to the commercial shipment would be presumed to belong to the insurance claimants, unless the explorer that had located and recovered the shipwreck could prove otherwise. *Columbus-America*, 974 F.2d at 465 & n.6. Judge Widener vigorously dissented, noting the "Herculean task" imposed under this approach. *Id.* at 475 n.7. (For obvious reasons, Columbus-America, the *in rem* plaintiff, was ultimately forced to stipulate on remand that, more than 130 years after the sinking of the vessel, it simply could not bear the burden of proving this negative proposition, *i.e.*, that the recovered gold did not come from the commercial shipment.)

In another case currently pending before the Court on petition for a writ of certiorari to the Fourth Circuit, that court similarly applied its automatic presumption against unity of interests to divide the *RMS Lusitania* into "owned" components of the vessel (such as the hull, tackle, apparel, appurtenances, and the like), on the one hand, and "abandoned" cargo and passenger effects, on the other hand. *See Bemis v. The RMS Lusitania*, 1996 U.S. App. LEXIS 24373 at *1, *6-*8 (4th Cir. Sept. 17, 1996), *petition for cert. docketed*, 65 U.S.L.W. 3648 (U.S. Mar. 14, 1997) (No. 96-1448). In that case, the Fourth Circuit applied its presumption against unity to deny rights to the *in rem* plaintiff, even though no claim of superior title to the cargo and passenger effects had been filed by anyone in the entire world. *Id.* at *7-*8.

In contrast to the presumption against unity of interests applied in the Fourth Circuit, the rule in the Ninth Circuit presumes a unified interest in the defendant *res*. Pet. App. A18. The Ninth Circuit's rule is thus the logical extension of this Court's analysis and application of the *in rem* presumption in *The Mary*, 13 U.S. (9 Cranch) 126 (1815). There, despite overwhelming evidence demonstrating that the vessel was owned by another party, the Court held that because no opposing claim to the vessel had been filed in the *in rem* proceeding, the District Court had no choice but to enter judgment for the plaintiff as a matter of law. *Id.* at 142-43.

Moreover, maintaining unified title to the *res* has important implications for the law's ability to ensure sound management of maritime resources. Technological advances have made access to shipwrecks somewhat easier, creating more interest in them, but at the same time placing them at greater risk of destruction. *See* H.R. Rep. No. 514(I), 100th Cong., 2d Sess. 1, *reprinted in 1988* U.S.C.C.A.N. 365. Recognition of the historical and archaeological value of shipwrecks is a key element when deciding how to protect a shipwreck site and its artifacts. *See* Colin Martin, *Archaeology in an Underwater Environment, in Protection of the Underwater Heritage* 14 (1981); Anne G. Giesecke, *Shipwrecks: The Past in the Present*, 15 Coastal Mgmt. 179, 180-81 (1987). Proper historical analysis and protection of shipwrecks is best served by keeping ownership in a single entity, so that the items may be recovered in an orderly manner and studied as a whole. As the court below noted, awarding piecemeal control over salvage among several entities, including various governmental bodies, would be a

"confusing and inefficient approach." Pet. App. A18.

The importance of assuring the unified study of shipwrecks having historical or archaeological significance springs from the nature of ships and shipwreck sites. A ship is an assemblage of objects and materials organized to perform certain functions, such as carriage of cargo or passengers. When a ship is wrecked, this organization begins to break down; over time, the components of the ship are likely to become battered and scattered over the shipwreck site, which may include a debris field with several plumes.[9] Historians and archaeologists are ultimately interested not in the wrecksites themselves, but rather in the ships and their cargo, which are in the process of disintegrating there, and accordingly they are devoted to untangling the disorganization found at such shipwreck sites. Keith W. Muckelroy, *Techniques and Approaches*, in *Archeology Under Water: An Atlas of the World's Submerged Sites* 12, 26 (Keith W. Muckelroy ed. 1980).

This process, in turn, depends on analyzing two key aspects of the underwater site: content and context. "On a wreck site, this means what you can find of the original vessel, and what relationships you can discover between the various pieces." *Id.* at 28. Allowing the unified study of objects found at a shipwreck site within their underwater context is critical to the ability of historians and archaeologists to perform their functions, and reconstruction "is possible only if the excavators have carefully recorded the seabed locations of every object." *Id.* at 29. Fragmentation and destruction of such sites among multiple claimants inevitably would have the opposite effect.

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[9] Columbus-America has pioneered the creation of two new scientific subdisciplines, sinking dynamics and degradation mechanics, to study this process.

The history of underwater archaeology is replete with lessons in the importance of maintaining the unified nature of the *res*, and conversely the irreparable loss of information that may result from fractionalizing a shipwreck site. *See generally* George Bass, *Mediterranean Wrecksites and Classical Seafaring*, in *Archeology Under Water: An Atlas of the World's Submerged Sites* 32 (Keith W. Muckelroy ed. 1980). For example, the ability of archaeologists at the Cape Gelidonya shipwreck to study not only the hull fragments, but also cargo and passenger effects (including four-handled copper ingots and broken bronze tools on the site) was critical to their findings that the Semitic maritime trade was much more active in the Mediterranean during the late Bronze Age than historians had originally thought, with Syrian or Canaanite merchant fleets exercising a strong influence on commerce in the area. *Id.* at 35; *see also The Sea Remembers: Shipwrecks and Archaeology* (Peter Throckmorton ed. 1987).

Finally, the Ninth Circuit's presumption of a unity of interest in the *res* fosters more efficient judicial administration. The intrinsic character of an *in rem* action is to adjudicate rights in specific property as against all others, and thus the whole world is said to be a party to an admiralty cause. *See Rounds v. Cloverport Foundry & Machine Co.*, 237 U.S. 303, 306 (1915). The core issue in such proceedings is whether the plaintiff, or someone else, has rights superior to the rest of the world.

For this reason, a plaintiff files an *in rem* proceeding in order to force any person or entity claiming superior title or conflicting rights to make its claims known in the proceeding. This allows the plaintiff an opportunity to confront and cross-examine all claimants. An *in rem* proceeding is a concursus, requiring everyone claiming an interest in the *res* to appear and either assert its own claim or defend against the plaintiff's claim. *See* Rule C(4) of the Supp. Rules for Certain

Admiralty and Maritime Claims. The purpose of *in rem* proceedings is thus to make a final determination regarding all competing claims in the *res*, and "all persons, including unknown claimants, may appear and be heard" together in one all-encompassing proceeding. *Id.*, Adv. Comm. Note. The intended result is much greater judicial efficiencies in hearing and resolving all competing claims, against a backdrop that treats the entire shipwreck site as a legally unified *res*.

This intended result would be undercut, however, by an approach that automatically divides a shipwreck into "abandoned" and "unabandoned" portions and imposes a presumption *against* the unity of title of the *in rem* plaintiff, thus encouraging a prolonged multiplicity of proceedings to adjudicate the ongoing conflicts among competing interests. In this scenario, courts will be faced with the burden of litigation over possibly hundreds of claims of purported successors-in-interest of owners and various insurers, with the opposing parties forced to bear the enormous legal and economic burdens of trying to disprove such stale and speculative claims. What Judge Widener labeled the "Herculean task" of having to try to sort out claims hundreds of years old resurrected by enterprising counsel will fall on American courts and those who, rather than secreting their finds or shopping for other, more favorable forums abroad, choose to continue to come before them. *Columbus-America*, 974 F.2d at 475 n.7 (Widener, J., dissenting); *see also To Hunt Treasure, Slip into a Lawsuit*, U.S. News & World Report, Apr. 16, 1990. The burden of proof thus should be on an intervening claimant to prove its claim that the *res* should be fractionalized.

B. Imposing a Presumption Against the Unity of the Defendant *Res* Would Discourage Incentives For Deep-Sea Exploration.

The Ninth Circuit was also correct in rejecting the

Fourth Circuit's approach for another reason that is significant here. The Fourth Circuit places the burden on an *in rem* plaintiff to prove a negative, *i.e.*, that any would-be intervening claimant does not have a valid claim. In the case of long-lost shipwrecks, this shifting of the burden of proof to deep-sea explorers, by according presumptive validity to intervening claims (and, in some cases, ageless vitality to stale claims many decades old), places a virtually insuperable hurdle in the way of confirming their title.

Thus, one of the many problems created by the Fourth Circuit's unfortunate decision in *Columbus-America* is that, with respect to abandoned shipwrecks, once it has been shown that a vessel itself belongs to the *in rem* plaintiff, the plaintiff still has the "continuing" burden of proof to stave off purported claimants. In the Fourth Circuit, the extreme result is that the plaintiff must establish the abandonment of *each and every item* recovered from the clearly abandoned vessel by clear and convincing evidence that it was expressly renounced. *See Columbus-America*, 974 F.2d at 465 & n.2, 468. This rule allows all intervenors that claim an ownership or subrogation interest to seek recovery against a commingled "salvage pool" consisting of identifiable portions of cargo and possessions that cannot be linked to specific persons, even though the purported claimants themselves could not establish their right of ownership in any of those items. This unreasonable rule stands in sharp distinction to the traditional rules of admiralty law applied by the court below in this case.

The effects of the undesirable disincentives created by the Fourth Circuit's approach are substantial. The opportunities for scientific research and development with respect to long-lost shipwrecks are tremendous. Such cultural deposits are unique laboratories, in many instances teeming with life forms and mysteries never before explored. The development of new technologies for exploring the deep ocean and the emerging legal concepts associated with this

exploration are also of great significance, especially since much of the developing law with respect to the exploitation and utilization of outer space by individuals and private enterprise is based on precedents in admiralty and maritime law. *See* H. De Saussure, *The Application of Maritime Salvage Law to the Law of Outer Space*, Proceedings of the 28th Colloquium on the Law of Outer Space, Stockholm, 1985.

Exploration of the deep-sea floor is fraught with risks. It requires highly complex and sophisticated technologies, and failures can occur at any stage of the exploration process. Enormous sums of venture capital are required if private enterprises, in addition to governments, are to have the opportunity to participate in such exploration.[10] *See* U.S. Congress, Office of Technology, *Technologies for Underwater Archaeology and Maritime Preservation--Background Paper*, OTA-BP-E-37, at 8 (1987).

The adoption of a presumption against an *in rem* plaintiff's unity of title, however, would squander opportunities for scientific research and development by creating uncertain and unpredictable financial incentives for this activity, thus making it difficult, if not impossible, to attract the enormous sums of private capital needed to underwrite such challenging ventures. *See* 30 U.S.C. § 1401(a)(13) (1994) (uncertainty in legal regime discourages private investment). Indeed, as the *Columbus-America* case illustrates, only after incurring the risks and expense of

[10] Those operations are in line with the federal government's strong encouragement for exploration of the seas and the preservation of sites that have great historical, archaeological, and scientific value. *See, e.g.*, The Marine Resources and Engineering Development Act, 33 U.S.C. § 1101 (1988); National Historic Preservation Act, 16 U.S.C. § 470 (1988).

bringing articles to the surface will explorers ever know how many purported claimants might appear. For this reason, the lack of certainty and predictability created by the Fourth Circuit's approach provides maritime explorers and entrepreneurs with an unfortunate disincentive to invest their resources in deep-sea recovery projects.

CONCLUSION

The judgment of the court below should be affirmed, and the issues in this case pertaining to the determination of whether a sunken merchant vessel has been abandoned and the rebuttable presumption of the unity of the *res* should be resolved by the Court in accordance with the foregoing discussion of the applicable legal principles.

Respectfully submitted,

RICHARD A. CORDRAY
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

ALAN G. CHOATE
One North Charles Street
The Blaustein Building
Baltimore, MD 21201
(410) 347-7007

RICHARD T. ROBOL
Counsel of Record
JANE E. RINDSBERG
JASON S. WRACHFORD
COLUMBUS-AMERICA
DISCOVERY GROUP
433 West Sixth Avenue
Columbus, Ohio 43201
(614) 299-6000

Counsel for Amici Curiae

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